BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENT W. WISHON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,006,696
TRUCK TECH	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the March 12, 2003 preliminary hearing Order For Compensation of Administrative Law Judge Pamela J. Fuller. Claimant was awarded benefits in the form of temporary total disability compensation and ongoing medical treatment, including the payment of medical bills, after the Administrative Law Judge determined that claimant's accidental injury of July 26, 2002, did arise out of and in the course of his employment with respondent.

ISSUES

Did claimant suffer accidental injury arising out of and in the course of his employment with respondent on the date alleged?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be reversed.

Claimant worked as a diesel mechanic for respondent at their Truck Tech location and would occasionally be called to respondent's other business, One Stop, if a truck would develop problems at that location.

Claimant testified that on the date of accident, he had been contacted by One Stop to proceed to their location to repair a broken-down truck. With claimant in the company pickup was his 15-year-old son, Andrew, whom claimant testified also worked for respondent. In fact, claimant testified his son had cut the grass around Truck Tech on the date of accident, but had not completed the job. Claimant and his son then went to lunch at McDonald's. Claimant was going to drop his son at his house with the McDonald's food and then proceed on to One Stop. Claimant alleges accidental injury on July 26, 2002, when shortly after exiting McDonald's, he was involved in an automobile accident, suffering substantial injuries.

Several representatives of respondent testified in this matter. Randall Schwanke, the owner both of respondent Truck Tech and of One Stop, testified that claimant did work for him as a diesel mechanic, but that claimant's son who had, at one time, worked for him mowing lawns had not worked for him for approximately six months before the date of accident. Mr. Schwanke acknowledged claimant regularly drove respondent's company pickup, but disputed claimant's testimony that claimant was on call 24 hours a day. Additionally, Mr. Schwanke testified that claimant was never called during his lunch hour.

Diana Howard, claimant's manager for the One Stop location, testified that they did occasionally contact respondent regarding truck problems at the One Stop location. However, she testified that on the July 26, 2002 date of accident, there were no calls made to Truck Tech or to claimant regarding any broken-down vehicle.

Finally, Rae Heitschmidt, the bookkeeper for both respondent and One Stop, testified first, that claimant's son had not worked for respondent since well before July 26, 2002. On the alleged date of accident, the son was not working for respondent. Additionally, she testified that no one from One Stop called that day requesting claimant to go to One Stop to repair any vehicle. She also stated that even if claimant had received a call regarding a broken-down vehicle, he would never go directly to the job site. He would always return to the shop in order to get tools and/or parts to complete the job.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[1]

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[1] K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

In order for a claimant to collect workers' compensation benefits under the Workers Compensation Act, he must suffer an injury arising out of and in the course of his employment.[2]

> The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[3]
>
> The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service.[4]

Under K.S.A. 2001 Supp. 44-508(f), the "going and coming" rule excludes compensation if the employee is on his or her way to or from work.[5] The Board acknowledges there are exceptions to the general rule that an employee is not eligible for workers' compensation when he or she is injured either on their way to or from his or her employment. These are the "premises exception" and the "special hazard exception".[6] It is not argued in this instance that either the premises or special hazard exception applies to this matter. It is, however, argued that claimant's journey was one where the operation of the motor vehicle on a public roadway was an integral part of claimant's employment or was inherent in the nature of the employment or necessary to the employment so that, in these travels, the employee was furthering the interests of his employer.[7]

In *Messenger*, the claimant was killed in a truck accident while on the way home from a distant drilling site. A key factor in *Messenger* was that the employer actively sought persons who were willing to work at "mobile sites". Additionally, as the respondent was in

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[2] K.S.A. 44-501.

[3] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984).

[5] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994).

[6] *Chapman v. Beech Aircraft Corp.*, 20 Kan. App. 2d 962, 894 P.2d 901, aff'd 258 Kan. 653, 907 P.2d 828 (1995).

[7] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

the practice of paying drillers to drive to far away points, providing an entire crew with transportation was customary.[8] Additionally, testimony in *Messenger* indicated that the company received a definite benefit when hiring crew members who agreed to travel, as the drilling company did not attempt to hire team members who lived near each drilling site, but instead expected the existing crews to travel to the drilling sites. In *Messenger*, the employees were found to have no permanent work site, but were required to travel to distant locations. As that was the common and accepted practice in the oil field business where Messenger was employed, the claimant's death was found to arise out of and in the course of his employment.

In the instant case, the facts are dissimilar from *Messenger*. Here, claimant worked at a central location and was not often required to travel in his employment. It was acknowledged that on occasions, claimant would travel from the Truck Tech site to the One Stop site in order to provide maintenance for broken-down vehicles. Had that been the instance here, claimant's argument that his accident arose out of and in the course of employment would have been substantially stronger. However, the evidence in this record contradicts claimant's allegation that he was on his way to One Stop to service a truck. No representative of respondent could verify that any call had been made from One Stop to Truck Tech on the date of accident, requesting claimant's presence. Claimant was on his lunch hour, traveling with his son who had not worked for respondent for over six months. And finally, Ms. Heitschmidt testified that claimant never went directly to a job site, but instead came back to the shop after a call in order to get tools and parts for the job.

The Board finds the evidence in this case convincing that claimant's accidental injury on July 26, 2002, occurred as claimant and his son were leaving McDonald's during claimant's lunch break. There was no work-related connection to this accident. Additionally, there was no clear indication from the evidence that claimant was actually traveling to any of respondent's locations. Therefore, the Board finds claimant has failed to prove accidental injury arising out of and in the course of his employment and the Order of the Administrative Law Judge in this instance should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary Order For Compensation dated March 12, 2003, from Administrative Law Judge Pamela J. Fuller should be, and is hereby, reversed, and claimant should be denied benefits for having failed to prove that he suffered an accidental injury arising out of and in the course of his employment with respondent.

IT IS SO ORDERED.

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[8] *Messenger*, at 439.

Dated this ____ day of June 2003.

BOARD MEMBER

c: Kevin T. Stamper, Attorney for Claimant
Terry J. Malone, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Director